



November 11, 2019

VIA FOIAonline.gov
FREEDOM OF INFORMATION ACT REQUEST

Regional Freedom of Information Officer
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
(303) 312-6306

Re: Records Relating to Spills, Leaks or Improper Disposal of Oil and Gas or Fracking-related Fluids, Materials or Wastes within the Exterior Boundaries of the Fort Berthold Indian Reservation, North Dakota

Dear Region 8 FOI Officer:

This letter is a request for information on behalf of Fort Berthold Protectors of Water and Earth Rights ("Fort Berthold POWER") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, and the Environmental Protection Agency's ("EPA") FOIA regulations, 40 C.F.R. § 2.100 *et seq.* This request seeks EPA records concerning spills, leaks or improper disposal of materials related to oil and gas production within the exterior boundaries of the Fort Berthold Indian Reservation in North Dakota. The relevant time period for this request is January 1, 2006, through and including the date of response to this request. The preferred format for responsive documents is electronic, if available.

We also request that EPA waive the fee that it would otherwise charge for search and production of the records requested herein, as "disclosure of th[is] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester[s]." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

I. Records Requested

We request all records related to any spills, leaks or improper disposal of oil, gas, frack fluid, brine, wastewater, chemicals, liquid hydrocarbons, frack sand or other chemicals used in the fracking or oil and gas production process, raw materials, hazardous materials or hazardous or solid waste materials related to fracking, drilling, oil and gas

development, extraction, transportation or processing within the exterior boundaries of the Fort Berthold Indian Reservation.

Fort Berthold POWER requests all of the following records in the possession, custody, or control of EPA that were created, stored, or received since January 1, 2006:

(1) all records created, stored, or received by the EPA Administrator, and any staff in Region 8 concerning spills, leaks or improper disposal described above within the exterior boundaries of the Fort Berthold Reservation, regardless of land ownership or status;

(2) all records reflecting communications between EPA (or the Department of Justice) and the Mandan, Hidatsa and Arikara Nation, the State of North Dakota, the Bureau of Indian Affairs, the Bureau of Land Management and/or any other entity or individual representing an entity engaged in oil and gas drilling, development, extraction, transportation, management or operation, or infrastructure construction, management or operation concerning spills, leaks or improper disposal as described above within the exterior boundaries of the Fort Berthold Reservation; and

(3) all records reflecting communications between EPA (or the Department of Justice) and any elected official or any other federal, state or tribal agency concerning spills, leaks or improper disposal as described above within the exterior boundaries of the Fort Berthold Reservation.

(4) All correspondence internal to EPA Region 8 and correspondence between EPA Region 8 and the Bureau of Indian Affairs related to the Mitigated Programmatic Environmental Assessment for oil and gas drilling on the Fort Berthold Indian Reservation issued in May of 2017, including comment letters submitted by EPA to the Bureau of Indian Affairs.

(5) All correspondence or other records, both internal and external, related to impacts to groundwater or surface water from fracking and oil and gas development, production, transportation, spills, leaking or otherwise related to oil and gas production within the exterior boundaries of the Fort Berthold Indian Reservation.

For purposes of this request, the term “records” is used to mean anything denoted by that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, reports, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104, and that that response

must “at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions[, if any, you] will claim with respect to any withheld documents.” *Citizens for Responsibility & Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. We request electronic copies of the records whenever possible.

In the event that any of the requested documents or portions thereof are exempt from disclosure under 5 U.S.C. § 552(b)(1)-(9), we expect to receive all reasonably segregable portions of such records that are not themselves exempt, pursuant to 5 U.S.C. § 552(b). If you withhold any requested documents or portions thereof pursuant to a FOIA exemption, we request a list of the documents withheld or redacted and the agency’s justification for doing so.

II. Fee Waiver Request

Pursuant to 5 U.S.C. § 552(a)(4)(iii) and 40 C.F.R. § 2.107(l), we request that EPA waive all fees associated with responding to this request because we seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, we request that it reduce them to the extent possible.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹ EPA’s FOIA regulations contain an identical requirement.² Here, the request satisfies the criteria that the U.S. Department of Justice (DOJ) has identified (and the D.C. Circuit and other courts rely on) to assess whether a requester is entitled to a waiver of fees under FOIA.³

A. Public Interest Factor

First, the disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”⁴ The request complies with EPA regulations and each of the criteria DOJ has identified for the public interest factor.

¹ 5 U.S.C. § 552(a)(4)(A)(iii).

² 40 C.F.R. § 2.107(l).

³ See, e.g., Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation).

⁴ See 40 C.F.R. § 2.107(l).

i. The request concerns the operations or activities of the government.

Fort Berthold POWER seeks information related to EPA's knowledge of, and responses to, fracking-related spills and/or improper waste disposal within the Fort Berthold Indian Reservation. Since EPA is an arm of the federal government, there is no question that the requested records concern "operations or activities of the government."⁵

ii. The disclosure is "likely to contribute" to an understanding of government operations and activities.

The records Fort Berthold POWER requests are "likely to contribute" to an understanding of the operations or activities described above because these documents are not otherwise in the public domain and are not accessible other than through a FOIA request.⁶ Due to the "checkerboard" land status within the Fort Berthold Indian Reservation, where some land is subject to federal or tribal jurisdiction and some land is subject to state jurisdiction, there is not a clear picture of the number and status of spills that have occurred within the exterior boundaries of the Reservation. Given the current and anticipated future level of oil and gas development within the Reservation and its impact on public safety and the environment, the records requested should be made available to the public. The documents requested are "meaningfully informative" and "likely to contribute" to a greater understanding of EPA's knowledge of and responses to oil and gas related spills on the Reservation, regardless of land status, as well as any communications between EPA and other agencies or outside entities about those matters.

The Fort Berthold Indian Reservation is home to the Mandan, Hidatsa, and Arikara Nation (MHA Nation) and is located in west-central North Dakota encompassing approximately a total of 988,000 acres that includes 457,837 acres in trust land status. Six reservation communities, White Shield, Parshall, New Town, Four Bears, Mandaree, and Twin Buttes edge around Lake Sakakawea, the third largest man-made lake in the United States, that runs diagonally through the reservation into the Missouri River basin. The Theodore Roosevelt National Park is located approximately 20 miles west of the reservation and the Audubon National Wildlife Refuge is located approximately 20 miles east of the reservation. As of August 7, 2019, the MHA Nation has 16,457 enrolled tribal members.

Since 2006, more than a thousand oil and gas wells have been drilled on trust lands within the Fort Berthold Indian Reservation, which add to the intense oil and gas development on fee lands within the exterior boundaries of the Reservation. The Reservation is home to many residents who live in close proximity to oil and gas operations and are exposed to air and water quality impacts resulting from those operations. The requested documents pertain to the effects of that development, including the potential impacts to water and other resources on the Reservation, which are of significant public interest.

⁵ See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

⁶ See *id.*

The release of the requested records in response to this FOIA request will provide significant new information for public understanding of the human health and environmental impacts of oil and gas development.

iii. The information will contribute to the understanding of the general public.

This information will contribute to the understanding of the general public.⁷ The general public is already following issues related to the impacts of fracking on the Fort Berthold Indian Reservation, which has frequently been the focus of investigative reports by members of the media.⁸ Thus, the non-public records concerning this topic that we are requesting will receive close and critical scrutiny from members of the public and the news media.

Fort Berthold POWER is a non-profit conservation affiliate of the Dakota Resource Council, a member of the Western Organization of Resource Councils that engages in public education and advocacy efforts on behalf of their members. Fort Berthold POWER will analyze, synthesize, and disseminate the requested information to their members and the broader public via their meetings, websites, newsletters, and action alerts. Fort Berthold POWER will utilize the requested information to inform its comments to state and federal decision makers and other advocacy efforts surrounding the Fort Berthold Indian Reservation area on behalf of its members. Fort Berthold POWER has substantial ability to disseminate information to the public through their written publications as well as websites, social media postings, and other internet resources.

iv. The information will contribute “significantly” to public understanding of government operations or activities.

The information sought will contribute “significantly” to the ongoing public conversation about the impacts of oil and gas development on the Fort Berthold Reservation.⁹ None of the materials we have requested are now widely known (if they have been made public at all), yet they are essential to the public’s understanding of EPA’s knowledge of and response to the impacts of ongoing oil and gas development, or any communications with outside entities concerning these issues. The extent to which spills on the Fort Berthold Reservation are being

⁷ See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

⁸ See, e.g., J. Nobel, Standing Rock Fights On: Tribal Activism Goes Solar, Rolling Stone, (June 4, 2019) (discussing fracking pipeline spills on the Fort Berthold Indian Reservation), at <https://www.rollingstone.com/politics/politics-features/standing-rock-fights-on-tribal-activism-goes-solar-843823/>; B. Meibers, Energy boom, carbon cost: Fossil fuels boost region’s economy but drive up emissions, Grand Forks Herald (Dec. 19, 2018), at <https://www.grandforksherald.com/business/4544979-energy-boom-carbon-cost-fossil-fuels-boost-regions-economy-drive>.

⁹ See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

reported and cleaned up, and whether EPA is communicating with outside entities about them, is not currently public information. As discussed above, Fort Berthold POWER will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public advocacy, including in any future decision-making on oil and gas leasing on the reservation. Releasing this information will, thus, significantly enhance public understanding of the impacts of spills, leaks and improper disposal that has occurred and is occurring on the Fort Berthold Indian Reservation.

Fort Berthold POWER advocates and publicly educates for conservation and protection of land, water, and air on which all life depends, particularly in the context of oil and natural gas development. Given that all Fort Berthold POWER members are either MHA Nation enrolled tribal members or non-tribal citizens living within the Fort Berthold Indian Reservation, it is essential that the organization and its members have a full understanding of impacts of past and potential future oil and gas development activities and related spills, leaks and improper disposal within the Reservation.

B. Commercial Interest Factor

Fort Berthold POWER is a non-profit, public interest conservation organization with no commercial interest in the requested documents. As described, the requestor seeks to use this information solely to inform the public and to support advocacy efforts around protecting human health and the environment from the impacts of oil and natural gas development on the Fort Berthold Indian Reservation. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). If EPA does not believe that the above information is sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

Please contact the undersigned if you find that this request is unclear in any way. Thank you in advance for your assistance.

Sincerely,

/s/ Gussie Lord

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